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No. 97-1879

In The

Supreme Court of the United States

October Term, 1997

MAC PANEL COMPANY,

Petitioner,

vs.

VIRGINIA PANEL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying the patent laws and the precedents of this Court when it reversed a district court decision finding that the patentee misused its patent by threatening to void its warranties when products of other manufacturers, over whom the patentee had no control, were used in high precision equipment previously purchased from the patentee?

2. Whether the court of appeals erred in applying the antitrust laws and precedents of this Court when it reversed a jury verdict of monopolization and attempted monopolization when no anti-competitive conduct occurred in the relevant market?

3. Whether the court of appeals erred in applying the antitrust laws and precedents of this court when it reversed a jury verdict of monopolization and attempted monopolization when the antitrust plaintiff failed to present any evidence refuting the antitrust defendant's showing that the alleged antitrust injury was not caused by the alleged anti-competitive conduct?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.6 of the Rules of this Court, respondent states that it has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

MAC Panel Company ("MAC Panel") comes before this Court as a willful infringer of two of Virginia Panel's patents and as a false advertiser. It has not petitioned this Court to review those findings. MAC Panel asks this Court to relieve it of responsibility for its willful infringement of the far more important of the two patents ("the '005 patent") and to find Virginia Panel in violation of the antitrust laws. The sole basis on which MAC Panel now seeks to be relieved of responsibility is that Virginia Panel threatened to void the extraordinary warranty of quality it provided on its patented product if the products of another manufacturer, over which Virginia Panel had no quality control, were used in the product. In seeking relief from responsibility for its actions, MAC Panel grossly misstates everything from the general subject matter of Virginia Panel's '005 patent to the evidence and testimony elicited at trial to the bases of the decision of the Court of Appeals for the Federal Circuit. MAC Panel even goes so far as to present a wholly unwarranted attack upon a decade's worth of Federal Circuit decisions on the issue of patent misuse, several of which this Court previously declined to review. MAC Panel wholly ignores the considerations governing this Court's review on writ of certiorari, instead asking this Court to review alleged misapplications of the law and alleged erroneous factual findings.

Although in the district court and before the Federal Circuit MAC Panel argued that many types of alleged Virginia Panel conduct constituted patent misuse and anti-competitive conduct in violation of the antitrust laws, MAC Panel limits its petition to this Court to one type of conduct, threatening to void warranties. To properly review the Federal Circuit's decision on the warranty issue, one must have an accurate statement of the relevant facts in the case.

A. Virginia Panel's '005 Patent

Virginia Panel's '005 patent is directed to an interface device that includes both a receiver and an interface test adapter ("ITA"). (C.A. App. A10145–A10158.) Each claim of the '005 patent requires *both* a receiver and an ITA. (*Id.*) Although Virginia Panel's '005 patent fully discloses the interface invention, including the receiver and the ITA, many variations of the actual interface device exist depending on the size of the device, the number of contact pins to be used, and the environment in which the device will be used.

Modules, pins, and patchcords — the "unpatented components" — are mounted within both the receiver and ITA. (C.A. App. A12252.) When an ITA is placed on the receiver and the handle on the receiver is closed, the receiver and ITA are pulled together to mate literally thousands of coaxial contact pins at once. (C.A. App. A6034-35.) Due to the high forces being applied to mate the thousands of co-axial contact pins, misalignment may result in the "crunching" of many pins with one throw of the receiver handle.

B. The Government Contracts That Are The Subject Of Mac Panel's Misuse Defense And Antitrust Claims

Mac Panel's patent misuse defense and antitrust claims actually arise from the award of a sole source government subcontract to Virginia Panel in 1988. Each branch of the military has developed its own automated test equipment. The Air Force's automatic test equipment program, referred to by the acronym "MATE," began in the early 1980's and adopted Virginia Panel's patented designed for its interface device. In the MATE program, MAC Panel, and others, sold their interface products as interchangeable with Virginia Panel's products for many years. (Pet. App. 40a.) Over time, mixing components of different manufacturers proved to be problematic in that while

components may be interchangeable in the sense that the interface devices will work with intermixed components for one, one hundred, or one thousand closing cycles of the interface, misalignment damage increasingly occurred as the systems aged. (C.A. App. A7669, A12123-24.) As MAC Panel's president explicitly testified, it was virtually impossible to determine whose components caused the damage to the system when the components of different manufacturers were intermixed. (C.A. App. A6877.)

These problems of intermixing components posed a particularly severe threat to Virginia Panel because it offered the most extensive warranties in the industry. (C.A. App. A12052, A7667-70, A6210.) It was only after these problems became apparent that Virginia Panel adopted a policy of not warranting its products to work with those of other manufacturers. (C.A. App. A7667-78.)

In 1988, the Navy began its automatic test equipment ("ATE") program referred to as the Consolidated Automated Support System, or "CASS." (Pet. App. 4a.) The primary contractor on the program, a division of General Electric later sold to Martin Marietta (hereinafter "GE/Martin Marietta"), subcontracted out the interface device portion of the automatic test equipment. The CASS interface device would not be an off-the-shelf item, but ultimately would be a next-generation ruggedized high-tech interface device for use in the harsh environment in which Navy ships operate. Not only did the program call for a device more rugged that its predecessors, but it also called for better electronic characteristics, far greater pin concentration, and a 36,000 cycle life span.[1] (C.A. App. A6116-17 and A12052.)

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1. A 36,000 cycle life span equates to a 15-20 year useful life for a device. (C.A. App. 7662-63.)

Many interface device manufacturers, including both Virginia Panel and MAC Panel submitted bids for the subcontract. Apparently assuming it could ride on Virginia Panel's coattails with little or no engineering development work as it had in the MATE program, MAC Panel actually turned down an opportunity to receive the CASS contract.[2] Virginia Panel ultimately won the contract, which called for several years of costly development and testing of the devices before large-scale production would get underway in the early 1990's. (C.A. App. 12514, A12050.) That initial sole-source CASS contract called for Virginia Panel to supply the Navy's prime contractor, GE/Martin Marietta, with over four hundred (400) receivers *and* ITAs. (*Id.*) Thus, even with the loss of sales due to the end of the MATE program, Virginia Panel's sales skyrocketed in the early 1990's due to the sales called for in the sole-source CASS contract it won in 1988.[3] (C.A. App. A12514.)

In 1992, the Navy began a follow-on program to purchase test program sets ("TPS"), which would be used to connect electronic equipment, such as aircraft navigation systems, to the CASS stations. (C.A. App. A6031.) Each TPS would include an ITA that must mate with the CASS receivers. (Id.) The industry commonly referred to the program as "CASS TPS." (C.A. App. A12255.) Under this program, the suppliers of electronic equipment that would be tested on the CASS stations, would develop test program sets to connect that electronic equipment to the CASS stations. Thus, a sole-source supplier was not named on the CASS TPS program. The test

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2. MAC Panel's president later called the decision to turn down the contract the worst mistake of his career.

3. Contrary to MAC Panel's implications, MAC Panel's sales rose steadily throughout the early 1990's. Its market share, however, dropped, because its sales did not rise as fast as Virginia Panel's sales rose in the same time period.

program sets, however, would have to be tested and meet the same ruggedness and performance criteria as the original interface devices. (C.A. App. A6100, A12515.)

MAC Panel skipped this testing phase completely, instead beginning a campaign of false advertising. (Pet. App. 51a, C.A. App., A12193, A12197.) As part of those efforts, MAC Panel advertised that the Navy and General Electric, the original prime contractor at the time, had tested and accepted MAC Panel as a qualified, or approved, supplier of CASS interface devices.[4] (C.A. App. A12131, A12158, A12186, A12193, A12197, A12199.) In the second trial in this case, the jury found these representations false and misleading, and awarded Virginia Panel, the only qualified supplier of CASS interface devices to GE/Martin Morretta, $64,853 in damages. (Pet App. 51a, C.A. App. A8530.)

From its experience in the MATE program in which parts from different manufacturers were intermixed, Virginia Panel knew all to well that mixing components from different manufacturers caused costly damage to the devices over time, even though, at first glance the parts appeared to be interchangeable. (C.A. App. A7667-68.) Even the United States government recognized at its highest levels the dangers of intermixing components from different manufacturers. (C.A. App. A12123.) Given the complexity and extremely tight tolerances of Virginia Panel's CASS interface devices and the absence of a number of critical features in MAC Panel's products, the damage caused by using MAC Panel's components in Virginia Panel's CASS interface devices was increasingly likely. (C.A. App. A7127-28.) Accordingly, Virginia Panel issued

4. MAC Panel's allegations that Virginia Panel intended to "dominate the market" refer to a document relating only to the market for CASS interface devices, not the relevant market, all receivers and ITAs, defined by MAC Panel in this case. (C.A. App. A10009, A10033.)

"product advisories" to its customers advising them of Virginia Panel's policy that it could not guarantee that its products would work for 36,000 cycles, i.e. more than a decade, when products from other manufacturers were used with Virginia Panel's products, and, therefore, the 36,000 cycle warranty would be void if products from other manufacturers were used. (C.A. App. A7662-63.)

C. The Posture Of The Case Below

In the district court, MAC Panel raised twenty-one defenses and nine counterclaims, most of which were dispensed by the district court on summary judgment. (C.A. App. A1560-88.) The district court held two trials before two different juries, the first trial on Virginia Panel's patent infringement claims and a second trial on Virginia Panel's false advertising claims, MAC Panel's defense of patent misuse, and MAC Panel's counterclaims for monopolization and attempted monopolization. (Pet. App. 35a.) The jury in the first trial found that MAC Panel had willfully infringed both of the Virginia Panel patents in the lawsuit. (Pet. App. 36a.) Prior to the second trial, the district court granted MAC Panel's motion in limine and precluded Virginia Panel from presenting to the second jury evidence relating to MAC Panel's willful infringement, despite the evidence's clear relevance to the equitable defense of patent misuse. (C.A. App. A1356, A1403-04, A5890-91.) The purported basis for excluding this evidence was that the district court had already heard the evidence in the first trial, and thus did not have to hear it again in the second trial to decide the equitable issue of patent misuse. (C.A. App. A1356, A1403-04, A5890-91.)

With respect to both the patent misuse defense and the antitrust counterclaims, the Federal Circuit reversed the district court's decisions with respect to the alleged voiding of

warranties on several alternative grounds. With respect to the equitable claim of patent misuse, the Federal Circuit supplied the alternative grounds that (1) "voiding a warranty, or threatening to do so, does not constitute use of a patent to control unpatented products"; and (2) "ample *unrefuted* evidence" established that Virginia Panel's "threats to void or limit the warranties on its ITAs also met the rule of reason test." (Emphasis added.) (Pet. App., pp. 20a-21a.) With respect to the monopolization and attempted monopolization counterclaims, the Federal Circuit ruled on the alternative bases that MAC Panel failed to show that the alleged antitrust damages were caused by the alleged conduct and that the alleged conduct was not anti-competitive in violation of the antitrust laws. (Pet. App. 24a-28a.)

D. The Federal Circuit's Even-handed Approach To Patent Misuse

Contrary to MAC Panel's contention, the doctrine of patent misuse is alive and well and, unfortunately, running rampant in the district courts. Despite the frequency by which accused infringers assert patent misuse as a defense in the district courts, surprisingly few cases reaching the Federal Circuit include patent misuse as an issue on appeal. The Federal Circuit's decisions in which patent misuse has garnered more than passing reference indicate a very even-handed approach to patent misuse, resulting in affirmance of the district court's decision in nearly all instances.[5]

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5. *See Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 669 (Fed. Cir. 1986) (affirming district court summary judgment finding of misuse based on tying arrangement); *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply, Inc.*, 45 F.3d 1550, 1558 (Fed. Cir. 1995) (affirming district court finding of no patent misuse based on alleged bad faith enforcement of patent); *Allen Archery, Inc. v. Browning Mfg. Co.*, 819 F.2d 1087, 1097-98 (Fed. Cir. 1987) (affirming district court finding of no patent misuse due to collection of

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REASONS FOR DENYING THE WRIT

I.

THE FEDERAL CIRCUIT'S DECISION FINDING NO PATENT MISUSE PROPERLY STATED THE APPLICABLE RULES OF LAW AND IS FULLY CONSISTENT WITH DECISIONS OF THE OTHER CIRCUITS UNIFORMLY HOLDING THAT THREATENING TO VOID WARRANTIES DOES NOT CONSTITUTE A TYING ARRANGEMENT.

The Federal Circuit's decision clearly recited the proper rules of law with respect to patent misuse. Not even MAC Panel takes issue with them. Rather, MAC Panel merely asserts that the Federal Circuit misapplied those properly stated rules of law. The Federal Circuit provided a two-page discussion of the relevant law of patent misuse, concluding with the following statement of the analysis it would apply:

> When a practice alleged to constitute patent misuse is neither *per se* patent misuse nor specifically excluded from a misuse analysis by § 271(d), a court must determine if that practice is "reasonably within the patent grant, *i.e.*, that is relates to subject matter within the scope of the patent claims." *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 708, 24 USPQ2d 1173, 1179-80 (Fed. Cir. 1992). If so, the practice does not have the effect of broadening the scope of the patent claims and thus cannot constitute patent misuse. *Id.*, 24 USPQ2d at 1180. If, on the

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royalties on parts used to reconstruct patented product); *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1580-81 (Fed. Cir. 1986) (affirming district court finding of no patent misuse).

> other hand, the practice has the effect of extending the patentee's statutory rights and does so with an anti-competitive effect, that practice must then be analyzed in accordance with the "rule of reason." *Id.* Under the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Kahn*, 118 S. Ct. 275, 279 (1997) (citing *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 343 & n.13 (1982)).

(Pet. App. 17a.) Next, the Federal Circuit properly recited the rule of law governing its review of the district court's decision:

> When reviewing a jury finding on an equitable issue normally reserved for the court such as patent misuse, *see Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 490-91, 52 USPQ 30, 32-33 (1942), we will first presume that the jury resolved the underlying factual disputes in favor of the verdict winner and leave those presumed findings undisturbed if they are supported by substantial evidence. Then in a manner analogous to our review of legal conclusions, we examine the conclusion *de novo* to see whether it is correct in light of the jury fact findings. *See Jurgens v. McKasy*, 927 F.2d 1552, 1557, 18 USPQ2d 1031, 1035 (Fed. Cir. 1991).

(Pet. App. 15a-16a.) In applying these properly stated rules of law, the Federal Circuit provided alternative holdings supporting its decision that no patent misuse exists in this case as a matter of law.

The Federal Circuit began its analysis by determining whether any of the alleged Virginia Panel practices constituted *per se* misuse. It concluded that voiding warranties, or threatening to do so, is not a tying arrangement, and, thus, is not a *per se* misuse. (Pet. App. 20a.) Next, the Federal Circuit determined whether the voiding of warranties had the effect of extending the patentee's statutory rights. Again, the Federal Circuit determined that it did not. (Pet. App. 20a.) The Federal Circuit succinctly stated its conclusion in this regard as follows: "We conclude that the jury's presumed fact findings cannot support its conclusion of patent misuse." (Pet. App. 16a.)

Mac Panel attempts to draw this aspect of the Federal Circuit's decision into the purview of this Court's review by arguing that decisions of the Court of Appeals for the Federal Circuit fall outside this Court's standard criteria for evaluating petitions for certiorari because the Federal Circuit hears all appeals in patent infringement cases. In the context of this case, where MAC Panel now bases its patent misuse defense solely upon an allegation that threats to void warranties constitute an impermissible tying arrangement, MAC Panel's assertion is simply wrong. Tying arrangements, and more particularly, allegations that threats to void warranties constitute tying arrangements, are by no means unique to patent cases or to the Federal Circuit. If fact, the circuits have uniformly held that threats to void warranties do not constitute a tying arrangement.

In *Marts v. Xerox, Inc.*, 77 F.3d 1109, 1112-13 (8th Cir. 1996); and *T. Harris Young & Assoc. v. Marquette Elecs., Inc.*, 931 F.2d 816, 827-29 (11th Cir. 1991), the Eighth and Eleventh Circuits respectively held that threats to void warranties do not constitute a tying arrangement as a matter of law. The Federal Circuit's decision in this case is perfectly consistent with these decisions of the other circuits.

MAC Panel presented no evidence in this case that Virginia Panel ever forced or required customers to purchase any unpatented components along with its patented interface devices or that it ever refused to sell its patented interface devices to any customer for any reason. To the contrary, customers were free to purchase components from any supplier of their own choosing. (C.A. App. A7670-71.) Virginia Panel's policy simply was not to warrant its interface devices if non-Virginia Panel parts were used. That is neither a tying arrangement nor patent misuse. *See, e.g., Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958) ("For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 991 (4th Cir. 1990) (stating that for an unlawful tying to exist, "the seller must coerce the buyer in *purchasing* the tied product") (emphasis added); *Marts*, 77 F.3d at 1111 (rejecting a tying argument based on warranty service as the tying product and copying cartridges as the tied product).

The cases cited by MAC Panel are inapposite, as they deal with traditional tying arrangements. In *Carbice Corp. of America v. American Patents Dev. Corp.*, 283 U.S. 27, 30 (1931), this Court addressed a traditional tying arrangement in which the patentee refused to license its patent unless an unpatented product, dry ice, was purchased from the patentee. Likewise, in *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 462-63 (1938), this Court addressed a traditional tying arrangement. In both *Carbice* and *Leitch*, the patentees actually sued their competitors claiming that the competitors' sales of unpatented products constituted contributory infringement. In view of the contributory infringement claims, it went without question that the patentees in both cases were trying to broaden

the scope of their patents to cover unpatented products. Both of these contributory infringement cases, of course, were decided prior to the 1952-enactment of 35 U.S.C. § 271(c), and thus, it is not clear at all that they are still good law. *See Dawson Chem. Co. v. Rohm and Haas Co.*, 448 U.S. 176, 200-201 (1980) ("As a result [of § 271(c)], it is no longer necessary to resort to the doctrine of patent misuse in order to deny patentees control over staple goods used in their inventions."). In any event, *Carbice* and *Leitch* support the Federal Circuit's decision here because they highlight the difference between the allegations in this case and actual tying arrangements.

Further, MAC Panel's argument that the enactment of 35 U.S.C. §§ 271(d)(4) and (5) in 1988 somehow "reaffirmed the applicability of this Court's misuse holdings in cases such as this" simply ignores history. *See Dawson Chem.*, 448 U.S. at 201 ("The limitations on contributory infringement written into § 271(c) are counterbalanced by *limitations* on patent misuse in § 271(d)." (Emphasis added). This Court's precedents prior to 1988, such as *Carbice*, held that *actual ties* between patented products and unpatented products constituted misuse. The 1988 legislation scaled back this Court's decisions by explicitly stating that actual ties between patented products and unpatented products are not misuse unless the patentee has market power. Cases such as this where the patentee never refused to sell its patented product and no actual tie existed were not misuse before or after the enactment of the 1988 legislation.

MAC Panel's argument that the Federal Circuit's decision somehow "eviscerates the patent misuse doctrine" is nonsense. MAC Panel can point to no case ever holding that voiding a warranty or threatening to void a warranty constitutes patent misuse. Thus, the Federal Circuit did not "eviscerate" the doctrine of patent misuse or even restrict it in any way. Rather, the Federal Circuit refused to *expand* the doctrine of patent

misuse to encompass conduct, voiding warranties or threatening to void warranties, that does not amount to a tying arrangement, or any other previously recognized type of misuse. Many types of patent misuse, such as actual tying arrangements, or collecting royalties after the expiration of a patent remain in force today as they did prior to the Federal Circuit's decision in this case.

The Federal Circuit additionally stated an alternative basis for its holding of no patent misuse. The second basis was that Virginia Panel had a legitimate business purpose for voiding its warranties. (Pet. App. 21a.) MAC Panel does not take issue with the Federal Circuit's stated rule of law, recited above, but instead asserts that the Federal Circuit misapplied that properly stated rule. MAC Panel's allegation in this regard, that the Federal Circuit improperly re-weighed the evidence in holding that Virginia Panel had a legitimate business justification for voiding its warranties, rests upon a misstatement of the Federal Circuit's decision. In particular, the Federal Circuit accurately stated that Virginia Panel had presented "ample *unrefuted* evidence" that it had a legitimate business justification for voiding its warranties. (Pet. App. 21a.) MAC Panel conveniently omits the word "unrefuted" from the Federal Circuit's opinion.

MAC Panel points to four pieces of evidence allegedly supporting its misuse claim, but none of this "evidence" remotely refutes the existence of a legitimate business reason for Virginia Panel to void its warranties. This Court should not accept MAC Panel's invitation for this Court to re-evaluate all of the evidence presented in this case.

II.

THE FEDERAL CIRCUIT HELD, CONSISTENT WITH THE OTHER CIRCUITS, THAT THREATS TO VOID WARRANTIES ARE NOT ANTITRUST ANTI-COMPETITIVE CONDUCT AS A MATTER OF LAW.

Since MAC Panel based its patent misuse allegations and anti-competitive conduct allegations upon the same Virginia Panel conduct, the Federal Circuit recognized that MAC Panel's patent misuse defense and antitrust counterclaims would fall together if the alleged conduct was not sufficient to support a finding of misuse:

> Because we determine that the conduct underlying the allegations of misuse does not amount patent misuse, the same conduct cannot support a judgment that VP's conduct violated the Sherman Act.

(Pet. App. 27a.) There was no need for the Federal Circuit to repeat its analysis of the warranty voiding allegations in the antitrust section of the opinion. The fate of MAC Panel's monopolization and attempted monopolization antitrust counterclaims is analogous to that of a bad faith enforcement antitrust claim when the subject patent is found to be valid, enforceable, and infringed. The claim simply cannot stand. *See Bio-Rad Labs., Inc. v. Nicolet Instrument Corp.*, 739 F.2d 604, 617 (Fed. Cir.), *cert. denied*, 469 U.S. 1038 (1984).

Mac Panel's entire argument that the Federal Circuit somehow held that no antitrust violation can exist in the absence of patent misuse is nothing more than a hoax. Here, MAC Panel is simply misrepresenting the Federal Circuit's decision in an attempt to manufacture an inconsistency between it and decisions of the other circuits when no such inconsistency exists.

III.

MAC PANEL FAILED TO PROVE INJURY AND CAUSATION.

With respect to antitrust injury and causation, MAC Panel again does not question the rule of law recited by the Federal Circuit, but rather questions the Federal Circuit's application of that properly stated rule of law. (Pet. App. 23a-24a.) In this regard, MAC Panel bases its entire argument upon a misrepresentation. In particular, MAC Panel argues that the effect of the CASS contract on MAC Panel's market share "was fully considered and explained by MAC Panel's experts." (Petition for Cert. at 19.) MAC Panel provides no citation to the record to support this statement.

At trial, the only "evidence" MAC Panel presented on the issue of causation was testimony from its two experts indicating that the only factors of which they were aware that may have caused the alleged loss of market share in the receiver and ITA market were Virginia Panel's sending of infringement notices and Virginia Panel's sending of "product advisories."[6] (C.A. App. A6807, 7210-11.) One of the experts openly admitted that the existence of other factors would influence his analysis. (C.A. App. A6807.) Virginia Panel responded by affirmatively proving the existence of other causes of the alleged loss of market share.

Most significantly, Virginia Panel presented evidence showing that the alleged decrease in market share was due solely

6. Notably, the Federal Circuit held that the infringement notices were not anti-competitive conduct in violation of the antitrust laws as a matter of law. MAC Panel has not sought this Court's review of that aspect of the Federal circuit's decisions. Thus, MAC Panel's antitrust claim fails as a matter of law because its own expert testified that the alleged injury was caused by the infringement notices, not by the voiding of warranties.

to MAC Panel's failure to win the sole-source CASS contract in 1988. Virginia Panel presented a graph displaying the market shares of Virginia Panel and MAC Panel, using MAC Panel's receiver and ITA market definition but excluding Virginia Panel's sales to GE/Martin Marietta, the CASS prime contractor, under the sole source CASS contract awarded in 1988. (C.A. App. A12513.) The foundation of this graph rested on the undisputed facts that (1) *all* of the sales under the CASS contract were attributable to Virginia Panel's winning the CASS contract in 1988, *not* to any sales efforts occurring in 1992-1994 when the alleged anti-competitive conduct occurred (C.A. App. A8083-84, A6809); and (2) most of the sales under the CASS contract began in 1992 when GE/Martin Marietta exercised Option 1 under that contract. (C.A. App. 12514, A12050.)

The graph clearly showed that when Virginia Panel's sales to GE/Martin Marietta under the 1988 CASS contract are excluded, *MAC Panel's market share actually increased.* Thus, MAC Panel's alleged loss of market share was not due to any alleged anti-competitive conduct by Virginia Panel, but rather to MAC Panel's failure to win the CASS contract in 1988.

Contrary to the bald representation in MAC Panel's petition, MAC Panel's experts, Friedman and Wood, did not address this alternative cause. (C.A. App. A6807.) Rather, Virginia Panel's alternative cause evidence stood unrefuted. In fact, as the Federal Circuit noted:

> Both Friedman and Wood conceded that they did not consider the effect of VP's sales to GE/Martin Marietta under the CASS contract because, as Friedman stated, that contract was signed "quite some time" before MAC's relevant loss in market share.

(Pet. App. 26a.; *see also* C.A. App. A6807-10.)

MAC Panel makes three statements purportedly in support of its argument that are wholly unsupported by anything in the record. First, MAC Panel states that the "alternate cause" only related to receivers. MAC Panel cites nothing in the record to support this statement. In fact, no evidence existed to support this statement. In particular, Virginia Panel presented the actual 1988 CASS contract at the trial. The contract includes sales of more than 400 ITAs. (C.A. App. A12050.) MAC Panel presented nothing whatsoever to refute the actual 1988 CASS contract. Instead, MAC Panel's expert, William Wood, admitted that he had not considered the effect of the CASS contract on the parties' market shares and that such an event would have affected his analysis. (C.A. App. A6807, A6809.)

Second, MAC Panel represents that MAC Panel's claimed damages were "solely for sales of ITAs." The injury alleged by MAC Panel in this case was loss of market share in the market for receivers and ITAs. MAC Panel's entire injury analysis was based upon graphs of the two companies sales and market shares of receivers and ITAs. Thus, MAC Panel's contention that the alleged injury was somehow limited to ITAs is simply wrong. Furthermore, the alleged loss of MAC Panel's market share, which was based on sales of receivers and ITAs, was clearly effected by Virginia Panel's sales of receivers under the CASS contract. MAC Panel itself included those sales in its market share calculations.

Third, MAC Panel argues that "anyone can sell [CASS] ITAs." MAC Panel neglects to recognize that both the jury and the district court flatly rejected this contention. The jury specifically found that MAC Panel's advertisements stating that it could sell ITAs into the CASS program were false and misleading and awarded Virginia Panel damages for all of MAC Panel's sales of such ITAs. (C.A. App. A38, A8530, A10250.) Further, in its opinion, the district court specifically held that

MAC Panel could not regain market share attributable to the CASS TPS program because MAC Panel was not a qualified supplier of such products. (Pet. App. 51a.) Furthermore, the record, including the Navy's CASS TPS approved parts list, unequivocally established that MAC Panel could not sell ITAs into the CASS TPS program until its products passed the proper tests. (C.A. App. A12255.) MAC Panel never presented any evidence that it had ever passed such tests. Further, the Navy's toll free CASSTRAC bulletin board clearly indicated that Virginia Panel was the only approved supplier of the CASS TPS ITAs. (C.A. App. A12515.)

Finally, MAC Panel states that Virginia Panel never presented any evidence that it ever voided a warranty for intermingling of products. (C.A. App. A7667-69.) Again, MAC Panel is simply wrong. Virginia Panel presented extensive testimony relating to a severe problem that one of its customers encountered from intermixing components. (*Id.*)

IV.

MAC PANEL PROVED NO LOSS OF SALES OR SHARE IN THE MARKET FOR THE "UNPATENTED PRODUCTS".

Mac Panel's argument that Virginia Panel's voiding of warranties constitute an antitrust violation suffers from another severe defect that MAC Panel does not even recognize. In particular, MAC Panel did not attempt to prove any injury arising from the voiding of warranties, i.e., loss of sales of the "unpatented products."

MAC Panel specifically limited the relevant product market to receivers and ITAs. (C.A. App. A1301.) Thus, unpatented components (such as modules, pins, and patchcords) are, by

MAC Panel's own definition, *outside* the relevant product market. The only types of antitrust claims that could possibly relate to improper use of a product within the relevant market to adversely affect competition outside the relevant market are (1) tying claims; and (2) monopoly leveraging claims.[7] Neither of those claims existed in the present lawsuit.

With respect to tying, MAC Panel did not plead a tying claim and repeatedly represented to the district court that it did not have a tying claim. (C.A. App. A4344-47; A1259.) With respect to monopoly leveraging, MAC Panel attempted to raise such a claim on the eve of trial and was firmly rejected by the district court. (C.A. App. A1309.) MAC Panel did not appeal the district court's ruling on monopoly leveraging to the Federal Circuit and, thus, MAC Panel cannot properly raise that issue in this Court.

Since neither tying nor monopoly leveraging were at issue in the appeal, the Federal Circuit had a simple and straightforward basis for finding that Virginia Panel's threats to void warranties could not, as a matter of law, support a finding of monopolization and attempted monopolization: MAC Panel failed to make the required showings of injury and causation in the market for modules, pins, and patchcords.[8]

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7. *See, e.g., Advanced Health-Care Servs. Inc. v. Radford Community Hosp.*, 910 F.2d 139, 149-50 (4th Cir. 1990); *Advanced Bus. Sys. and Supply Co. v. SCM Corp.*, 415 F.2d 55, 60 (4th Cir. 1969).

8. *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990); *Metrix Warehouse v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987).

CONCLUSION

MAC Panel continues to cling to its hope that it will not be held accountable for its willful infringement of Virginia Panel's '005 patent and, to complete the odyssey, will receive extensive damages from Virginia Panel. MAC Panel's petition must be denied because MAC Panel fails to demonstrate that review by this Court is warranted. The Federal Circuit's decision is entirely consistent with the decisions of the other circuits finding no impropriety in voiding or threatening to void warranties. MAC Panel's entire petition is based upon allegations of erroneous factual findings and misapplications of properly stated rules of law and does not present a compelling reason for granting the petition.

Accordingly, MAC Panel's petition for certiorari should be denied.

Respectfully submitted,

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